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## VERDICTS & SETTLEMENTS

### Jury Awards Estate of 87-Year-Old \$3 Mil. in Wrongful Death Case

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The estate of a woman who was 87 at the time of her death was awarded \$3 million in a wrongful death action in Philadelphia, though settlements may reduce the overall recovery amount.

A Philadelphia jury in late June found in *Kessler v. Berman* that anesthesiologist Marvin Berman and nurse anesthetist Jeffrey Park were causally negligent in their care of Jeanette Kessler, who died in the hospital after an elective knee replacement surgery.

The unanimous 12-member jury found Berman 35 percent negligent and Park 65 percent negligent. It awarded \$2 million for wrongful death and \$1 million in a survival action.

Park entered a confidential settlement immediately prior to trial along with co-defendants United Anesthesia Services, Nazareth Hospital and Mercy Health System, according to Kessler's attorney, Brian Chacker of Gay Chacker & Mittin. Chacker said Park and United Anesthesia Services were the same entity and were basically agents of Nazareth and Mercy Health System.

That leaves the collectible part of the verdict for Kessler at Berman's 35 percent, or \$1.05 million, plus the sum of the confidential settlement. The jury was unaware of any prior settlement and Park's attorney sat through the entire trial, Chacker said. He said he is seeking a little more than \$227,000 in delay damages.

Philadelphia Common Pleas Court Judge Matthew D. Carrafiello presided over the trial that began June 16 and went to the jury June 23. The jury deliberated for about two hours, Chacker said.

Kessler's argument against Berman and Park revolved around the way pain medication was administered. According to court documents, Berman had trouble during Kessler's knee surgery administering an epidural catheter that would deliver pain medication. So he instead used a spinal catheter that would be left in post-surgery for the continuing administration of pain medication, the documents said.

On the morning after her June 17, 2005, surgery, Kessler was complaining of pain and the doctor who performed her surgery ordered a bolus, or a large dose of medicine given to rapidly penetrate the blood stream, according to court records. Her medication, ropivacaine, was also increased from 1cc to 2ccs per hour.

Park was called away from a surgery to administer the 6cc bolus around 8:40 a.m. and after staying with Kessler for two to three minutes after he gave the dosage, he returned to the surgery, according to court documents.

At 9 a.m., another nurse came into Kessler's room and noticed she was pale and unresponsive. According to court records, Kessler suffered a near fatal arrhythmia and had to be resuscitated, intubated and put on a ventilator. She died five days later after her family decided to take her off of life support in response to a "do not resuscitate" provision in her living will. Kessler's children were told she could potentially survive, but only in a vegetative state, according to court documents.

Chacker argued in court documents that it was the spinal catheter that resulted in the overdose to Kessler because such a catheter delivers medicine directly into the spinal fluid. The same dosage delivered epidurally would not have been as problematic, he argued in court papers.

Berman should have marked the catheter to alert anyone delivering pain medication that it was a spinal catheter and not an epidural catheter, Chacker argued. He argued Park should have checked to make sure what type of catheter was used and should have stayed at least 5 to 10 minutes with Kessler to ensure there was no adverse reaction to the medication, according to court records.

Park testified at his deposition that he assumed Kessler had an epidural catheter, according to court papers.

In his pretrial memorandum, Park's attorneys, James Kilcoyne and Jacqueline Drygas of Kilcoyne & Nesbitt in Plymouth Meeting, Pa., said Park consented to settlement but requested a neutral third-party help the two sides overcome differences they were having over the settlement value. According to Park's memorandum, Kessler was seeking a settlement demand of \$2.1 million.

Chacker said Park didn't provide a defense at trial and testified that he knew he made a mistake and apologized to the family. Chacker said there was a mediation well prior to trial, but it was unproductive.

Park's attorney, Kilcoyne, confirmed that Park entered into a confidential settlement prior to trial. He said his associate, Drygas, sat through trial because Park was still on the verdict sheet. Kilcoyne also confirmed that Park apologized on



BRIAN S. CHACKER

the stand and testified he could have done something differently.

Berman argued in court papers filed by his attorneys, Gary Samms and James E. Kurack Jr. of Obermayer Rebmann Maxwell & Hippel, that he was not present when the bolus was administered and that he had clearly marked Kessler's anesthesia record to show she had a spinal catheter.

Nazareth Hospital and Mercy Health System argued in court documents by its attorneys at Kane Pugh Knoell Troy & Kramer that Kessler's claim that the hospital was vicariously negligent failed because neither Berman nor Park were direct employees of the hospital.

In describing Kessler at trial, Chacker painted a picture of a vibrant 87-year-old who spent time with friends, took trips to Atlantic City, played cards and was the designated driver for dinner trips with friends. She took exercise classes weekly and participated in line dancing, he said.

"I think that the importance of this case is that each plaintiff needs to be taken independently, and simply because someone is 87 years old doesn't mean that the value of their life is any less than someone who might be a little younger," Chacker said.

Kessler was a widow with no surviving spouse. Her children, daughter-in-law and sister testified at trial. Chacker said it was her friend's testimony and video of Kessler at birthday parties at age 83 and 85 that showed the jury what a vibrant person she was.

He said the family was happiest at the news that Nazareth Hospital has changed its policies for using spinal epidurals since Kessler's death. He said they now require clearer markings on the catheter and that anyone administering a bolus remain with the patient for about 15 minutes.

Kessler put on the stand anesthesiologist Lorne B. Sheren of Chatham, N.J., as an expert witness and Berman's expert witness was anesthesiologist Robert Salvage of Clinical Pain Management Associates in Fairless Hills, Pa.

Berman's attorneys, Samms and Kurack, and Nazareth Hospital's attorney, Cynthia Brennan of Kane Pugh, were unavailable for comment by the time of publication.

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